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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-583

JAMES H. MCCONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 500 F. 2d 347. The memorandum and order of the district court (App., *infra*, pp. 1a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1974. A petition for rehearing was

denied on October 15, 1974 (Pet. App. A5). The petition for a writ of certiorari was filed on November 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner has standing to object to a search and seizure of evidence from an automobile rented by a co-conspirator, when petitioner guaranteed payment under the rental agreement but was never in possession of the vehicle and was not present at the time of the search.

2. Whether the evidence at petitioner's trial was tainted by statements of a convicted co-conspirator that were allegedly the product of undue coercion.

3. Whether the evidence is sufficient to sustain petitioner's conviction of illegally importing marihuana.

STATEMENT

After a trial without a jury before the United States District Court for the Southern District of Texas, petitioner was convicted of possessing approximately 300 pounds of marihuana with the intent to distribute it (count 2), conspiring to commit that offense (count 1), and smuggling marihuana into the United States (count 4), in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), 846, and 952 (Pet. 4; Tr. 132).[1] He was sentenced to five years'

[1] Petitioner was indicted together with Robert Connerly, who was tried separately and convicted on the conspiracy count.

imprisonment, with a special parole term of two years, on the first count; an identical sentence was imposed jointly on counts 2 and 4, to run consecutively to the sentence imposed on count 1 (Tr. 134-135). The court of appeals affirmed (Pet. App. A1-A4).

1. The facts, as developed at trial and at a pretrial suppression hearing, are reviewed in detail in the memorandum and order of the district court (App., *infra*, pp. 1a-7a, 11a-12a). On May 9, 1972, Richard G. Byrd was stopped by two Border Patrol agents on a "roving patrol" on U.S. Highway 59, approximately 40 miles east of the border town of Laredo, Texas. While inspecting the interior of Byrd's vehicle for concealed aliens illegally in the United States, one of the agents detected the odor of marihuana. An inspection of the trunk of the vehicle revealed approximately 300 pounds of marihuana. In addition to the marihuana, the agents found a rental car receipt showing the car to have been rented from the Hertz Corporation in Houston, Texas, with petitioner's name inserted in a "to be paid by" blank. A Texaco credit card in petitioner's name was also found in Byrd's possession.

Charges were filed with the United States Magistrate against Byrd and petitioner, but the charges against petitioner were later dropped. Byrd was subsequently indicted and convicted of possessing the marihuana with the intent to distribute it and of carrying a firearm in the commission of the felony. Prior to trial, Byrd made no statement concerning

his guilt or innocence or the involvement of any associates. He did not testify at his trial and offered no evidence in his own behalf.

Byrd was sentenced on January 8, 1973. In May 1973, he contacted Dan Beto, a probation officer for the court, and stated that he wanted to make a statement to the Customs Service. The court arranged an appointment for Byrd to meet with customs officials, and Byrd gave a statement implicating petitioner, among others, in the events that led to Byrd's arrest. Byrd thereafter appeared before a grand jury, and his testimony led to petitioner's indictment on the present charges.

On September 7, 1973, Byrd's conviction was reversed by the court of appeals (Pet. App. A8-A17), which concluded initially that the search of Byrd's vehicle was illegal in light of this Court's intervening decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266. On rehearing, the panel abandoned its reliance upon *Almeida-Sanchez*[2] but sustained its prior reversal of Byrd's conviction on the authority of other Fifth Circuit cases (Pet. App. A18).

2. At petitioner's trial, Border Patrol Agent Emilio Escobedo testified concerning the stop of Byrd's vehicle and the discovery of the marihuana therein (Tr. 20-30). Two employees of the Hertz Corporation testified that on April 19, 1972, Byrd and Julian D. Price rented two automobiles in Houston, Texas.

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[2] Another panel of the Fifth Circuit had subsequently ruled that *Almeida-Sanchez* should be given only prospective application (Pet. App. A18).

Arrangements for the rental were made through a Hertz office in Jackson, Mississippi. Petitioner, who was present at that office, agreed to guarantee the payment of the rental fee by allowing it to be charged on his American Express credit card. The rental agreements were made out to Byrd and Price, who took possession of the vehicles (Tr. 4-20). The license number of the car rented to Byrd on that date was the same as the number of the car carrying the marihuana that Byrd was driving on May 9 (Tr. 11, 22, 24).

Julian Price testified that he had known petitioner for a number of years and had "[t]ransported a bunch of marihuana" for him in 1972 (Tr. 31). He stated that he was hired by petitioner in August 1971 to accompany petitioner in transporting a quantity of marihuana from McAllen, Texas, to Atlanta, Georgia (Tr. 32-35), and again in February 1972, when Price and Byrd were hired by petitioner to drive loads of marihuana from Laredo, Texas, to Atlanta (Tr. 35-42). Price also related the arrangements that were made for petitioner to pay for the vehicles that Price and Byrd rented on April 19, 1972 (Tr. 42-46). He testified that he, Byrd, Jerry Webb, and Robert Connerly, acting pursuant to petitioner's instructions throughout the transaction, proceeded to Laredo, Texas, where they picked up loads of marihuana and transported them to Atlanta and Orlando, Florida (Tr. 45-53). He also testified that petitioner had arranged for Price and Byrd to trans-

port marihuana from Laredo, Texas, on May 9, 1972, the date of Byrd's arrest (Tr. 54-63).

Throughout the transactions, Price, Byrd, and the other drivers involved acted pursuant to specific instructions from petitioner concerning the manner in which the marihuana was to be picked up and transported. Jerry Webb, who had also been hired by petitioner to drive loads of marihuana on April 20 and May 9, gave testimony that essentially corroborated that of Price (Tr. 76-96).

In his defense, petitioner called Richard Byrd as a witness, but Byrd's testimony did not relate to the above-described events. Counsel for petitioner offered a stipulation to the effect that petitioner's Texaco credit card and a copy of the Hertz rental agreement were found in Byrd's vehicle at the time of Byrd's arrest, to which the government agreed (Tr. 99-102).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that the marihuana found in Byrd's vehicle should have been suppressed as the product of an illegal search and seizure and that he has standing to make that claim.[3] Assuming *arguendo* that the pre-*Almeida-Sanchez* roving patrol stop and search of Byrd's vehicle were unlawful under the standards applicable to such a

[3] The argument relates only to petitioner's convictions on the substantive counts. The district court, in finding petitioner guilty of the conspiracy, "excluded from [its] consideration with respect thereto the questionable evidence" (App., *infra*, p. 6a).

search,[4] petitioner nevertheless lacks standing to challenge them.

As the court of appeals stated, "there was no showing whatever that [petitioner] had a reasonable expectation of privacy with respect to the Byrd vehicle" (Pet. App. A3). Although petitioner claims that he was the lessee of the vehicle and therefore had a substantial possessory interest in it, the district court found that Byrd, not petitioner, was the actual lessee and that petitioner merely guaranteed petitioner's credit (App., *infra*, p. 7a). Moreover, petitioner never had possession of the vehicle and was not present at the time it was stopped and searched. Consequently, as the district court correctly concluded (*ibid.*), he would not have standing even if he were, technically speaking, the vehicle's lessee. As the absentee renter of an automobile to be used for illegal purposes, petitioner did not, in the circumstances of this case, acquire a legitimate expectation of privacy with respect to the vehicle sufficient to invoke the protections of the Fourth Amendment.

Petitioner also appears to claim (Pet. 12) that he has standing to object to the seizure of the marihuana

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[4] The Fifth Circuit's decision on rehearing in *Byrd* (Pet. App. A18), in which the panel held the stop and search invalid under pre-*Almeida-Sanchez* standards, is in conflict with the same court's decision in *United States* v. *Miller*, 492 F. 2d 37, where the panel reached a contrary result on similar facts. Subsequent to the *Byrd* panel's decision on rehearing, the Fifth Circuit entered a unanimous *en banc* order in *Miller* endorsing the panel's opinion in that case (499 F. 2d 1247). *Byrd* remains pending on the government's petition for rehearing *en banc*.

because he was charged with its possession. Petitioner was charged and convicted as an aider and abettor of Byrd's unlawful possession, however, and that charge does not presuppose a possessory interest by petitioner in the contraband of the sort that the Fourth Amendment was designed to protect. Proof of petitioner's possession of the marihuana was not an essential element of the offense. Moreover, an interest in the marihuana would at most give petitioner standing to challenge the reasonableness of its seizure, not the reasonableness of the search leading up to its seizure. If, as we have shown, petitioner had no substantial interest in the vehicle, his rights could not be invaded by a search of the vehicle. Once the search revealed the marihuana, it was reasonable for the officers to seize it as contraband without a warrant. Thus, even if petitioner were considered to have standing to object to the seizure itself, his objection would lack merit.

Nor is petitioner's position advanced by the general argument (Pet. 12-14) that "but for" the allegedly illegal arrest of Byrd, the government would never have learned of petitioner's involvement in the marihuana transactions or of the identity of Webb and Price, who testified at petitioner's trial, and therefore that every development following Byrd's arrest was "tainted." This argument wholly fails to overcome the consequences of petitioner's lack of standing. Moreover, the evidentiary exclusionary rule designed to enforce the Fourth Amendment has never been construed to confer so broad an immunity

from investigation and prosecution. As this Court stated in *Nardone* v. *United States*, 308 U.S. 338, 341:

> Sophisticated argument may prove a causal connection between information obtained through [illegal means] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

2. Although no statement by Byrd implicating petitioner in the offenses charged was introduced at trial, and Byrd's testimony at trial did not incriminate petitioner (Tr. 104-128), petitioner contends (Pet. 14-20) that statements made by Byrd to government officials led to petitioner's indictment and eventual conviction and were the product of governmental coercion and duress that tainted the evidence offered at trial. The short answer to this claim is that only the alleged victim of the unlawful conduct, here Byrd, would have standing to complain of it. Cf. *United States* v. *Calandra*, 414 U.S. 338, 347-348. In any event, a detailed review of the circumstances culminating in Byrd's statement to customs officials shows that no wrong was committed.

Following Byrd's conviction on September 28, 1972, the district judge (the same judge who presided in the instant case) routinely requested a presentence investigation, which was conducted by Dan Beto, a probation officer of the district court (App., *infra*, pp. 3a-4a). Richard Byrd testified that he had two meetings with Beto during the presentencing proce-

dures. Byrd declined on the first visit to make any statement concerning his involvement in the offense charged (Tr. 126). Byrd conferred with his counsel, who advised him to "cooperate as much as possible," and on the second visit by Beto, approximately two weeks later, Byrd gave an extensive statement to Beto concerning his involvement in marihuana transactions (Tr. 124). The import of the statement, which was included in the presentence report, was described in the district court's memorandum (App., *infra*, p. 4a).

> Under the heading "Defendant's Version" (wherein a defendant is afforded an opportunity, if he elects, to state his version of the offense), Byrd gave a detailed statement concerning the organization for which he worked. This was to the effect that he, together with one Julian Price, was employed by James H. McConnell to run loads of marihuana from the Mexican border to Atlanta, Georgia, and other cities in the South. Byrd described the method of operation, the fee ($500 per trip), how the expenses were paid, and the number of trips which he and Price had made for McConnell. He stated that McConnell had given him the pistol which he was carrying at the time of his arrest. Byrd further stated to the probation officer that he (Byrd) did not know who was paying his attorneys' fee, but that he suspected that it was McConnell. This was the first time McConnell's name or his possible complicity had come to the Court's attention.

When the presentence report was presented to the court,[5] the judge noted that serious question arose out of the fact that Byrd was being represented by attorneys who were apparently being paid by his employer, petitioner, who was a possible unindicted co-conspirator. In the court's words (*id.* at 5a):

> It appeared then—as it appears at this moment —that there was a serious conflict of interest between the position of [petitioner] and that of Byrd. This would result from the fact that it was obviously to [petitioner's] interest for Byrd to remain uncooperative in all particulars, and to assume full responsibility for the offense; while it well might have been to Byrd's best interest to take a contrary course.

With that thought in mind, the judge directed Mr. Beto and Chief Probation Officer Miggins to speak with Byrd and explain to him what a conflict of interest was, that he was entitled to counsel devoted to serving his sole interest, that if he was unable to employ counsel the court would appoint one for him, and that Byrd should consider where his own best interest lay with regard to the future handling of the case. Byrd was so advised, and on January 8, 1973, he was sentenced (*ibid.*).

Byrd had no further contact with Beto until May 1973, some four months later. At that time, he con-

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[5] The Assistant United States Attorney who prosecuted petitioner's case stated that he had never seen this presentence report and never discussed Byrd's case with the probation officer (H. Tr. 34-35). ("H. Tr." refers to the transcript of the pre-trial hearing conducted on November 28, 1973.)

tacted Beto and stated that he wanted to make a statement to the Customs Service concerning his involvement in the matter (*id.* at 5a-6a). That statement led to petitioner's indictment and conviction.

The testimony of Beto concerning his conversations with Byrd (H. Tr. 13-26) and the testimony of the attorneys who were representing Byrd (H. Tr. 40-70) are in conflict as to the amount of "pressure" applied on Byrd to encourage him to make a statement to customs officials, which he eventually did some four months after he was sentenced. The testimony of Byrd himself, however, establishes that his eventual statement to customs officials was not the result of undue coercion. At trial, Byrd testified as follows in response to questions by petitioner's counsel (Tr. 112):

> Q: Now, you made a statement, a very complete statement, to these gentlemen, did you not?
>
> A: Yes, sir.
>
> Q: And in the back of your mind, why did you make that statement?
>
> A: Why, sir?
>
> Q: Yes, sir.
>
> A: Because I knew that I had broken the law, and I should be punished for this. But I just think that we should clear the record and tell who did what. I told them the whole truth, that is all.
>
> Q: This past week at 11:30, when you talked to me and I discussed with you that same ques-

tion, and I directed your attention to that same time and place, did you tell me the reason you did so, because in the back of your mind you thought you would get a lighter sentence?

A: I wanted to take the sentence that I deserved, sir.

Q: And did you not say that to me, "In the back of my mind, I thought I would get a lighter sentence."

A: In the back of my mind, I did, but that is not the reason I came.

There is no evidence of misconduct on the part of the judge or the probation officer that would warrant reversal of petitioner's conviction.[6]

3. Petitioner contends (Pet. 21), without substantial supporting argument, that the evidence is insufficient to sustain his conviction on the smuggling count (count 4). We note initially that petitioner received a joint sentence on counts 2 and 4. There is thus no need to consider his argument on this issue. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16; *Benton* v. *Maryland*, 395 U.S. 784. In any event, the argument is without merit.

The following findings by the district court are supported by uncontradicted evidence in the record (App., *infra*, pp. 11a-12a):

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[6] Nor, as petitioner contends, was the trial judge disqualified because he "became a witness in the case" (Pet. 20). At the pre-trial hearing, the judge did state his recollection of occurrences for the record (H. Tr. 11-15, 26-27), but this hardly made him a witness in the case.

> Throughout the conspiracy it appears that the drivers were in frequent telephonic communication with [petitioner] by which means they received their instructions on a day-to-day basis, and in some cases on an hour-to-hour basis. Additionally, the drivers had no personal contact with the suppliers of the marihuana. Invariably they were instructed by [petitioner] where to park their vehicles, and when to return to pick up such vehicles. At that time the vehicles would be loaded with marihuana; and they would again contact [petitioner] to receive instructions as to the destination of the load.
>
> In the instant case, when the drivers, in Laredo, phoned [petitioner] for instructions as to loading, they were advised by him "the river was too high for the load to be crossed" by reason of which fact they were to take off for two days and to return to Laredo for further instructions. The drivers drove to McAllen, Texas, and returned to Laredo as they had been told. They received further instructions as to where and when the vehicles were to be parked for the loading to take place. When they followed the instructions, they found the cars loaded.

The evidence supports the court's conclusion that petitioner was guilty as a principal of illegally importing marihuana, because he procured the commission of the offense (18 U.S.C. 2(a)) or willfully caused others to import the marihuana illegally (18 U.S.C. 2(b)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1975.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM AND ORDER:

This defendant, James H. McConnell, tried alone, is charged in three counts of a four count indictment with (1) conspiracy to possess some 300 pounds of marihuana, with intent to distribute it; (2) as an aider and abetter in the possession with intent to distribute the same load of marihuana; and (3) with the smuggling of same into the United States. Two of the three co-defendants have entered pleas of guilty, and the third convicted in a separate trial.

McConnell's guilt is not in controversy. The evidence shows without dispute that he was a wholesale distributor of marihuana, who recruited and employed a number of young men to transport the marihuana from the Mexican border to cities throughout the South. Usually rented vehicles were employed. Each load was of some 200 to 300 pounds. Many of such loads resulted from McConnell's efforts.

The defense rests upon two questions of law, namely, whether this defendant has standing to question the validity of the search of one such vehicle, of which McConnell claims to have been the lessee; and his further contention that statements later made by the driver—which led to McConnell's indictment and trial—were not voluntarily given, or were the result of undue pressure or duress. By reason of this, Mc-

Connell urges that the law enforcement officers should never have learned of his identity or complicity at all.

It should be borne in mind, as noted in the chronological statement of the facts which follows, that most of these events occurred in those simple and uncomplicated days preceding the opinion of the Supreme Court in *Almeida-Sanchez* v. *United States*, —— U.S. ——, 93 S.Ct. 2535, 37 L.Ed.2d 596, June 21, 1973. Hence the matter should be viewed in that context.

In the early morning hours of May 9, 1972, one Richard G. Byrd was stopped by Border Patrol officers for an immigration check approximately 40 miles east of the City of Laredo, Texas, and on one of the two principal highways leading away from that city and the Mexican border. (See *United States* v. *Byrd*, 483 F.2d 1196 (5th Cir. 1973), reversing the conviction on the basis of *Almeida-Sanchez, supra.*) In the course thereof, one of the officers smelled marihuana, and required that Byrd open the trunk of his car. Some 300 pounds were found therein. Byrd was promptly arrested. A pistol was found on the floor of the car. The glove compartment of his car produced a car rental receipt showing the vehicle to have been rented by the Hertz Corporation in Houston, Texas. This document is of considerable importance, as will be noted hereafter. In the blank "to be paid by," the name "James H. McConnelly" was inserted. Byrd signed in the space provided for the lessee of the vehicle. Other blanks gave his

(Byrd's) driver's license and address. The car had been delivered to Byrd in Houston, Texas, April 19, 1972.

In Byrd's possession also was a Texaco credit card in the name of James H. McConnell.

Charges were promptly filed before the United States Magistrate against Byrd, and against McConnell. Byrd was completely uncooperative with the officers, and made no statement as to his guilt or innocence, or as to his associates. Charges against Byrd were presented to the grand jury, but the United States Attorney did not present charges, nor request an indictment, against McConnell because of the insufficiency of the evidence. The charges against McConnell were dismissed.

Following indictment, Byrd was arraigned. He was represented by the firm of attorneys of Heagy & Caswell, of Odessa, Texas. These attorneys did not reside in the Southern District of Texas and had not been admitted or previously appeared in this Court.

On September 28, 1972, the charges against Byrd went to trial. The evidence simply showed his possession of the quantity of marihuana, under the circumstances mentioned above. Byrd did not testify or offer any evidence in his own behalf. He was convicted of possession of the marihuana with the intent to distribute it, and of carrying a firearm while in the commission of this felony. He was acquitted on a third count (of smuggling the marihuana into the United States). The Court routinely requested a

presentence investigation and set the date for sentencing some six weeks thereafter.

The presentence investigation was prepared by Mr. Dan Beto, one of the probation officers of this Court, and was handed to the Court November 3, 1972.

The first unusual development in the Byrd case was the disclosure made in the presentence investigation. Under the heading "Defendant's Version" (wherein a defendant is afforded an opportunity, if he elects, to state his version of the offense), Byrd gave a detailed statement concerning the organization for which he worked. This was to the effect that he, together with one Julian Price, was employed by James H. McConnell to run loads of marihuana from the Mexican border to Atlanta, Georgia, and other cities in the South. Byrd described the method of operation, the fee ($500 per trip), how the expenses were paid, and the number of trips which he and Price had made for McConnell. He stated that McConnell had given him the pistol which he was carrying at the time of his arrest. Byrd further stated to the probation officer that he (Byrd) did not know who was paying his attorneys' fee, but that he suspected that it was McConnell. This was the first time McConnell's name or his possible complicity had come to the Court's attention.

This knowledge that the defendant Byrd was represented by attorneys previously unknown to the Court, and who apparently were paid by this defendant's employer, raised a serious question in the Court's mind as to the propriety of such representa-

tion. It appeared then—as it appears at this moment —that there was a serious conflict of interest between the position of McConnell and that of Byrd. This would result from the fact that it was obviously to McConnell's interest for Byrd to remain uncooperative in all particulars, and to assume full responsibility for the offense; while it well might have been to Byrd's best interest to take a contrary course. The Court noted that he had elected to remain completely silent during the trial; but that a month later, in discussing the matter with a probation officer in Houston, and in the absence of his attorneys, had elected to divulge this information. With this thought in mind, the Court called Mr. Beto and the Chief Probation Officer of the District (Mr. Miggins) and instructed them that they should speak again with Byrd; they were instructed to explain to him what a conflict of interest was; to advise him that he was entitled to counsel devoted only to his own best interests, without regard to the interest of any other potential defendant; that if he was unable to employ counsel on his own behalf, as an indigent the Court would appoint counsel to represent him; and to advise him that he should consider wherein his own best interests lay with regard to the future handling of his case. These probation officers reported to the Court in January, 1973, that Byrd had been so advised, and stated that he would consider the matter. Byrd was sentenced January 8, 1973.

The Probation Service heard nothing further from Byrd until May, 1973, some four months later. At

that time he contacted Mr. Beto by phone and stated that he had considered the matter, and decided that he wanted to cooperate and to make a statement about the entire matter to the Customs Service. At his request an appointment was arranged, and Byrd proceeded from his home in Louisiana, alone, to Laredo, Texas, where he gave an extended statement implicating McConnell, Price, and two other drivers, namely, Webb and Connerly. He appeared before a grand jury, and his testimony led to the present indictment of these parties.

With respect to the charge of conspiracy (Count 1), the question of McConnell's standing to question the arrest and search of Byrd is immaterial. The testimony of Price and Webb was clear, convincing, and undisputed regarding the agreement among the conspirators to possess large quantities of marihuana for the purpose of distribution. A number of overt acts are shown to have been committed within this District, all prior to Byrd's arrest. Hence the offense is made out without regard to the evidence surrounding the Byrd search. [*Brown* v. *United States*, 411 U.S. 222, Note 4, p. 230, 1973; *Sandejas* v. *United States*, 428 F.2d 1040 (9th Cir. 1970).] I find the defendant guilty on Count 1 of the indictment, and have excluded from my consideration with respect thereto the questionable evidence.

With respect to Count 2 (charging this defendant as an aider and abetter in Byrd's possession of the 300 pounds), the question of his standing is material. As stated, McConnell contends that he was the lessee

of the vehicle and, although not present and never having had the vehicle in his possession, that he nevertheless has standing to question the search.

The evidence on this point is to the following effect. At the time that Byrd was to make the trip in question, he was in Houston, Texas, while McConnell was in Jackson, Mississippi. Byrd did not have the necessary funds or credit to lease the car. Recognizing this situation, McConnell and Byrd had arranged that at a designated time, McConnell would present himself at the Hertz office in Jackson, Mississippi, where he would guarantee that the rental on Byrd's vehicle (to be delivered to Byrd in Houston) would be paid, by use of McConnell's credit card. The Hertz representative in Houston spoke to the Hertz representative in Jackson, by telephone; the arrangement was confirmed; and the Houston agent delivered the vehicle to Byrd.

Under these circumstances, I construe Byrd to have been the lessee of the vehicle, with his credit guaranteed by McConnell. The rental agreement (Exhibit 2) so indicates and I would construe the oral testimony to the same effect. Even if McConnell be considered the lessee, in a technical sense, without ever having had possession of the car and not being present at the time of the arrest, I would have serious doubt as to his standing, for the search was not directed at him.

In dealing with this question the Supreme Court has stated in *Jones* v. *United States*, 362 U.S. 257, at 261:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .

"Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

Additionally, in a more recent case clearly in point, through Mr. Justice White the Court stated (*Alderman* v. *United States*, 394 U.S. 165 (1969):

"We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons* v. *United States*, 390 U.S. 377 (1968); *Jones* v. *United States*, 362 U.S. 257 (1960). Cf. *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943). None of the special circumstances which prompted *NAACP* v. *Alabama*, 357 U.S. 499 (1958), and *Barrows* v. *Jackson*, 346 U.S. 249 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object

for himself when and if it becomes important for him to do so.

"What petitioners appear to assert is an independent constitutional right of their own to exclude relevent and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion."

Also, see *Brown* v. *United States*, 411 U.S. 223 (1973).

In this connection it should be noted further that the only *property* of McConnell discovered in the Byrd search was his Texaco credit card. *This was not offered by the Government, but was offered by the defendant.*

Nor do I consider that the defendant McConnell may escape by the argument that Byrd's unlawful arrest set in motion the whole chain of circumstances; and that every development that followed was contaminated. McConnell was convicted on the testimony of Price and Webb; the Government learned of Price and Webb from Byrd's statement in May, 1973, a year following his arrest and four months following his sentence. The exclusionary rule has never gone so far. "Sophisticated argument may prove a causal connection between information obtained through illicit [means] and the Government's proof [obtained

from independent sources]. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). And see, *Gissendanner* v. *Wainwright*, 482 F.2d 1293 (5th Cir. 1973).

Additionally, it should be borne in mind that Byrd's arrest and all that ensued was not illegal *at the time that it occurred.* The arrest became illegal only by reason of *Almeida-Sanchez.* Similar arrests and convictions had been repeatedly upheld in prior cases, e.g., *United States* v. *Wright*, 476 F.2d 1027 (5th Cir. 1973); *United States* v. *McDaniel*, 463 F. 2d 129 (5th Cir. 1972); *United States* v. *Maggard*, 451 F.2d 502 (5th Cir. 1971); *United States* v. *Bird*, 456 F.2d 1023 (5th Cir. 1972); *United States* v. *Thompson*, 475 F.2d 1359 (5th Cir. 1973).

Defense counsel likewise urges that the contact between the probation officer and Byrd was such as improperly to influence him to talk, or to lose confidence in his counsel, all of which resulted in his change of heart as result of which he elected to testify. Such a chain of causes is too devious and attenuated to find support in any authority with which I am familiar. There was no impropriety or overreaching in the Probation Service of this Court having explained to Byrd the dangers inherent in his position when his counsel was employed and paid by a potential co-defendant whose interests were adverse; and it was more than four months following the sentencing and

the last contact between Byrd and the Probation Service before he advised of his change of heart, and gave the incriminating testimony before the grand jury.

Byrd did not testify as a Government witness at the trial. He was called by the defendant, and testified only as to his conversations with the probation officer involved.

Thus, considering the evidence developed following Byrd's arrest (the rental agreement, and the 300 pounds of marihuana in Byrd's possession), I find the defendant guilty on Count 2 of the indictment.

With respect to Count 4 (smuggling the 300 pounds here at issue), the evidence is all circumstantial. However, it is convincing and in my judgment adequate beyond a reasonable doubt to support a conviction.

Throughout the conspiracy it appears that the drivers were in frequent telephonic communication with McConnell by which means they received their instructions on a day-to-day basis, and in some cases on an hour-to-hour basis. Additionally, the drivers had no personal contact with the suppliers of the marihuana. Invariably they were instructed by McConnell where to park their vehicles, and when to return to pick up such vehicles. At that time the vehicles would be loaded with marihuana; and they would again contact McConnell to receive instructions as to the destination of the load.

In the instant case, when the drivers, in Laredo, phoned McConnell for instructions as to loading, they

were advised by him "the river was too high for the load to be crossed" by reason of which fact they were to take off for two days and to return to Laredo for further instructions. The drivers drove to McAllen, Texas, and returned to Laredo as they had been told. They received further instructions as to where and when the vehicles were to be parked for the loading to take place. When they followed the instructions, they found the cars loaded.

Thus it appears clear that under § 2 of Title 18 U.S.C.A. McConnell was a principal in the smuggling operation in that [under subparagraph (a)] he "procured" the commission of the offense or [under subparagraph (b)] that he willfully caused the smuggling to be done. Thus I find the defendant guilty on Count 4.

The Probation Service will prepare a presentence investigation. The defendant McConnell will present himself for imposition of sentence on notice. Clerk will furnish counsel copy of this Memorandum.

Done at Houston, Texas, this 24th day of January, 1974.

/s/ Ben C. Conally
United States District Judge

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